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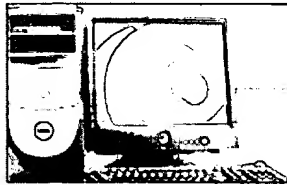
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ReplayTV lawsuit: Napster redux?

By [Doug Isenberg](#)

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THE DEFENDANT'S ROLE AND THE TECHNOLOGY AT ISSUE IN THIS NEW CASE ARE DIFFERENT FROM THE SITUATION IN THE NAPSTER CASE IN WHAT COULD BE IMPORTANT WAYS.

Have you heard about the lawsuit in which a number of big players in the entertainment industry allege that a technology enabling the widespread distribution of digital files via the Internet is illegal because it constitutes copyright infringement? The plaintiffs believe that, among other things, extensive use of the technology could adversely affect their sale of entertainment products on traditional media sold in stores.

If you're saying to yourself, "Of course, I know all about the Napster case," don't stop reading yet. Because I'm not talking about Napster, or any of the other lawsuits involving peer-to-peer MP3 file swapping. Instead, I'm talking about a new lawsuit,

filed Oct. 31 by a number of companies in the television industry--including the three major broadcast networks--against Sonicblue, which markets the ReplayTV devices.

The newest of these devices, the ReplayTV 4000 series, are at the center of this new and important high-tech copyright litigation. The machines, according to the lawsuit, are part of an "unlawful scheme" that "attacks the fundamental economic underpinnings of free television and basic nonbroadcast services."

The TV industry is attacking ReplayTV for two reasons:

- The new machines enable people to record television programs and then watch them without commercials via the "AutoSkip" feature, thereby tempting advertisers to pull the plug on what the lawsuit calls "the lifeblood of most television channels": advertising.
- The machines allow users to share programs they've recorded with others via the "Send Show" feature, which transmits digital copies of shows over the Internet to other ReplayTV owners, thereby enabling people who have not paid for premium channels to watch premium content for free.

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Both the AutoSkip and the Send Show features violate U.S. copyright and other federal and state laws, according to the TV industry plaintiffs, who want sales of the ReplayTV 4000 devices—slated for shipment on Nov. 15—stopped.

Certainly, this case will be closely watched by both the entertainment and high-tech industries, which are yet again being pitted against each other in a clash of law vs. technology.

In some ways, the ReplayTV lawsuit is a lot like the Napster litigation. Indeed, the plaintiffs in this new case have already drawn comparisons to Napster—not a bad idea, considering that Napster has lost just about every round in its ongoing legal battle. "Just as Napster established a commercial business that was predicated on—and knowingly benefited from—the unlawful copying and distribution of music files by users," the plaintiffs in the ReplayTV suit state in their complaint, Sonicblue and ReplayTV "plan to create a network in which they facilitate, induce, and profit from the unlawful distribution of television shows and feature films costing millions (and in some cases tens or hundreds of millions of dollars) to produce."

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However, the company's role and the technology at issue in this new case are different from the situation in the Napster case in what could be important ways. For example, although the Send Show feature of ReplayTV is somewhat akin to Napster's file-swapping application, according to news reports, the feature prevents users from sending a show to more than 15 people. Also, unlike Napster, it appears that ReplayTV users can only share files with people they know, not with millions of strangers.

The AutoSkip feature is not at all present in the Napster lawsuits. Though it's easy to see why the TV industry plaintiffs would not like a system that allows people to skip commercial advertising, VCR users have been able to do the same thing for years--albeit with much greater effort than ReplayTV's automated system requires--by starting and stopping a videotape during recording or by fast-forwarding during playback. And, of course, users who don't have VCRs often skip commercials, too. Should Frigidaire be held legally liable for distracting TV viewers who leave the room during commercial breaks to grab a glass of milk?

Also, while the plaintiffs in the ReplayTV lawsuit are unquestionably owners of the copyrighted programs broadcast on their networks and channels, they are not the copyright owners of the commercials they show. As a result, it seems quite odd that the plaintiffs would claim copyright infringement when users don't watch something to which the plaintiffs don't hold the copyrights.

Then, of course, there's the problem of the 17-year-old landmark case in which copyright owners, whose programs were broadcast on TV, sued Sony over its introduction of one of the first video-recording devices, the Betamax. In that case, the U.S. Supreme Court ruled that Sony was not liable for copyright infringement because the machines were capable of "substantial noninfringing uses."

The plaintiffs in this new lawsuit claim that the ReplayTV devices "differ radically" from the technology at issue in the Betamax case. Of course, the courts will decide how radical the differences really are.

In the end, the question may be whether the ReplayTV 4000 system is more like the Betamax (which the courts have blessed) or Napster (which the courts have cursed). Stay tuned.

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Doug Isenberg, a lawyer in Atlanta, is the editor and publisher of GigaLaw.com, an award-winning Web site that provides legal information to Internet professionals on topics including online copyright law, domain name disputes, privacy in cyberspace and Internet patents. Isenberg writes and speaks frequently about Internet law and is the author of the upcoming book "The GigaLaw Guide to Internet Law," to be published by Random House in fall 2002.

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